

# APPENDIX 2

## SITE RESTORATION AND MITIGATION PLAN

### I. Ditch Restoration

The ditches excavated by the Defendants at the Holly Ridge Site (the “Site”) that are the subject of this action have been identified by number for ease of reference, as shown on the site map attached as Exhibit 1 (Sheet ER-1, Project Number 407-08, Sediment & Erosion Control Plan of Cape Fear Engineering, Inc dated October 23, 2002) to this Appendix. The restoration requirements for each ditch are stated below. In addition to restoration of ditched areas described below, any additional areas of the Site that are current or potential erosion and sedimentation problems at the Site as determined by the NC Division of Land Resources (“NCDLR”) shall be adequately stabilized so that they do not pose a threat of continuing sedimentation of waters.

#### A. General

The spoil piles at the Site that were created as the result of Defendants’ ditching activities will be placed back into the ditches. Where ditches are to be filled, they must also be vegetated and stabilized. All ditch filling or regrading occurring in wetlands must be revegetated using wetland vegetation. Clay plugs must be utilized in appropriate locations. Subject to parties' further calculations and discussions, clay plugs will be used at the downstream end of each ditch being filled and at locations approximately one-third and two-thirds of the distance up the ditch from the downstream end. All refilling and regrading must be carried out as required by the NCDLR.

#### B. Ditches 1, 2, 3, 5, 7, 8, and 17

These ditches must be filled, clay plugs used, and revegetated. Spoil piles must be pushed into ditches to help fill and stabilize the ditches. Where ditch spoil was not sidecast and no spoil is alongside of ditch, adequate fill material must be hauled to the ditch.

#### C. Ditch 4

The three loop portions of Ditch 4 will be filled. The portion of Ditch 4 from the powerline right of way to the existing water control structure will be regraded and stabilized with slopes less than or equal to three-to-one (horizontal to vertical). Rock check dams will be installed, as required by NCDLR, along the portion of Ditch 4 that is not being filled to control sediment and to reduce ditch flow velocity. All filled or regraded areas must be revegetated.

#### D. Ditch 6

This ditch can be left as is.

#### E. Ditches 9 and 12

Ditches 9 and 12 shall be regraded such that all side slopes are stable with a slope of two-to-one or flatter, with the existing vertical banks collapsed to raise and fill the ditch bottom. Newly graded slopes will be stabilized immediately. Existing rock dams and flashboard risers shall be left in place. The outfall of ditch 9 will be modified to eliminate any existing discrete conveyance of drainage, via eroded or excavated channel, in the 200 foot wide conservation easement strip to be dedicated along Cypress Branch pursuant to Section V below. The drainage from ditches 9 and 12 will be spread into sheet flow to wetlands adjoining Cypress Branch. Ditches 9 and 12 will not be modified in the future in any way that would allow any direct conveyance of drainage to Cypress Branch as a result of a ten year/ 24 hour storm event.

#### F. Ditches 10 and 11

These ditches must be filled as shown on Exhibit 1. Clay plugs must be used, and the ditch fill revegetated. Spoil piles must be pushed into ditches to help fill and stabilize the ditches. Where ditch spoil was not sidecast and no spoil is alongside the ditch, adequate fill material must be hauled to the ditch.

#### G. Ditches 13, 14, 16

These ditches may remain in place as is unless DENR or EPA require any further stabilization.

All plans and applications for approval or permitting of the ditch restoration work described above shall be submitted to the respective permitting agencies (including the U. S. Army Corps of Engineers for authorization to place dredged or fill material in waters of the U.S.) and to the Plaintiffs within 45 days of July 8, 2004.. All work shall be commenced within 60 days of receipt of all necessary permits or approvals and shall be completed within 120 working days of commencement.

### **II. Wetland Mitigation**

In addition to the ditch restoration work required above, Defendants will restore 15 acres of on-site lands that historically were wetlands but which do not currently have wetland characteristics due to past ditching, farming, or other practices. The 15 acres will be restored to fully functioning wetlands. The wetlands to be restored must be wetlands that were not affected by the ditching activities complained of in the Amended Complaint. Should Defendants choose not to restore all of the 15 acres on-site, Defendants shall pay for wetland restoration to a party to be agreed upon, at the State of North Carolina's then-applicable non-marsh restoration rate per acre, for a total of 15 acres (combining the acreage restored and the payment in lieu of restoration). This 15 acres is separate and distinct from the fifteen acres of wetland restoration to be procured if the Supplemental Environmental Project described in Appendix 3 below does not occur.

This restoration will be accomplished in accordance with a Wetlands Restoration Plan to be prepared by a qualified consultant engaged by Defendants and acceptable to the Plaintiffs. The

Wetlands Restoration Plan will be submitted to the Plaintiffs for approval before implementation begins. Plaintiffs' approval will not be unreasonably withheld. This Restoration Plan shall partially mitigate for loss of wetland hydrology in the vicinity of Ditches 9 and 12 (the amount of which is in dispute between the parties) affected by the continued presence of Ditches 9 and 12.

All plans and applications for approval or permitting of the wetland mitigation work described above shall be submitted to the respective permitting agencies and to the Plaintiffs within 45 days of July 8, 2004. All work shall be commenced within 60 days of receipt of all necessary permits or approvals and shall be completed within 120 working days of commencement. The success of the wetland restoration work shall be assessed by the parties in accordance with the criteria contained in U.S. Army Corps of Engineers (Wilmington District) Compensatory Hardwood Mitigation Guidelines (12/8/1993).

### **III. Delineation of Waters of the United States**

A full jurisdictional delineation of waters of the United States for the Site must be completed two years after ditch restoration is completed. If these first two years have an aggregate average of less than 85% of the normal precipitation for the Site (as determined by rainfall measured at the Wilmington, NC, airport), the delineation must be completed three years after ditch restoration. The jurisdictional delineation will be performed in accordance with normal U.S. Army Corps of Engineers procedures, but must be approved by EPA and will become an Appendix to the Consent Decree.

### **IV. Limitations on Transfer and Permitting**

During the two or three year period of restoration work, until the delineation described in Section III above is completed and approved, Defendants shall not apply for approvals or permits to develop the Site. Defendants may after notice to the Plaintiffs sell portions of the Site provided any purchaser of any portion of the Site must acknowledge and agree to comply with the terms of the Consent Decree, and Defendants acknowledge that they remain fully liable to comply with the terms of the Consent Decree.

### **V. Conservation Easement**

As further mitigation for any wetland loss and for violations of Sections 301 and 402 of the Clean Water Act, Defendants shall grant to a conservation owner designated by Plaintiffs, which may be Plaintiff N.C. Coastal Federation, a conservation easement in the areas depicted on the map which is attached to the Consent Decree as Appendix 4 and which approximates the following:

- (A.) A fifty foot wide strip along the southwestern boundary of the Site from the western-most junction of the Site with Cypress Branch to the northwest corner of the Site;
- (B.) A two hundred foot wide strip along the southwestern boundary from the junction

with the existing paved road northwest to the western most junction of the Site with Cypress Branch, as described in (A.);

(C.) An irregularly shaped area substantially including the coastal wetlands identified adjacent to the South Atlantic Intracoastal Waterway; and

(D.) The acres of restored wetlands pursuant to Section II above.

These easement areas are shown on Exhibit 1 to this Appendix and cover 141.53 acres.

The terms of the conservation easement shall allow Defendants to construct pedestrian-only walkways across the area described in (C.) above for access to docks that may be constructed along the shoreline adjacent to the Atlantic Intracoastal Waterway and such reasonable utilities as necessary to provide for the safe use of such walkways and docks. All such walkways and docks will be subject to any permit requirements of DENR and the U.S. Army Corps of Engineers. The easement shall not allow a marina. In addition, all of the conservation easement locations shall allow Defendants to construct minimal utility crossings that may be necessary to connect utilities to upland areas separated by the conservation easement and to the adjacent properties. The easement will prohibit the construction of ditches or other forms of conveyance to discharge stormwater or other pollutants across the easement into waters of the United States, except for the stormwater permitted to be discharged as sheet flow into the wetland areas at the termini of ditches 9 and 12 as stated above in Paragraph I. E. In addition, Defendants may obtain an NPDES permit to discharge stormwater from the pond north of the James Johnson Road into the existing ditch that runs into the marshes along the South Atlantic Intracoastal Waterway. The easement terms will include standard provisions granting to the easement holder the rights of access to the easement property and rights to enforce the terms of the easement and Defendants shall pay the easement holder a one-time stewardship fee of \$10,000 for accepting the easement.

The easement grant shall be completed and recorded within 60 days of July 8, 2004.

## **VI. No New Discharges Across Southwestern Site Boundary.**

Defendants agree that they will not discharge stormwater or other pollutants across the portion of the southwestern Site boundary (currently the James Johnson boundary southwest of James Johnson Road) that is not being included in a conservation easement under the preceding Section. The Defendants agree to place restrictions in any instrument transferring or otherwise conveying the portion of the Site that prevent any future owner from discharging stormwater or other pollutants across this portion of the southwestern Site boundary.

# **APPENDIX 3**

## **SUPPLEMENTAL ENVIRONMENTAL PROJECT**

To further enhance the aquatic environment in the vicinity of the Site and to restore surrounding waters to their beneficial uses, the Defendants agree to increase the tidal flow and circulation and to improve water quality in vicinity of Permuda Island by removing the northern-most three hundred feet of the Permuda Island Causeway, as shown on the map attached to this Consent Decree as Exhibit 2. The removal of the Permuda Island Causeway will be pursuant to the following terms and conditions:

1. Plaintiff North Carolina Coastal Federation (NCCF) consents to be the permittee for the causeway removal work. Defendants or their agents will procure the engineering services, equipment, and contractors to implement the causeway removal plan. The project shall be carried out at no cost to NCCF and Defendants will reimburse to NCCF its out-of-pocket expenses for engaging an engineer to review Defendants' plans and permit documents and oversee the project implementation, and for NCCF staff time reasonably devoted to the permitting and project oversight responsibilities. NCCF staff time shall be reimbursed at the rate of \$30.00 dollars per hour, not to exceed a total of \$5,000.00 (exclusive of out-of-pocket expenses and engineering costs).
2. NCCF and Defendants will enter into a contract for the causeway removal project pursuant to which NCCF will have no legal or financial responsibility for any violations or damages resulting from the permitting and implementation of the Permuda Island causeway project.
3. The causeway removal will involve dredging only so far as necessary to remove the causeway down to the level of the natural-occurring bottom. The depth of dredging shall conform to the bottom alongside the length of the existing causeway.
4. The Plaintiffs will not oppose Defendants' or their designee's application for a permit to construct a dock or docks from the portion of the causeway that remains after the removal described above, provided that:
  - (a) the final configuration of such docks will result in at least one hundred and fifty feet of open water that is presently covered by the causeway;
  - (b) all docks will be constructed so as to permit the flow of water under the docks; and
  - (c) the use of such docks will be restricted to boats without "heads."
5. The parties will use their best efforts to obtain necessary permits for the causeway removal project, and will submit permit applications and plans within 45 days of July 8, 2004. The project will be commenced within 60 days of the receipt of the necessary permits and shall be completed within 120 working days after commencement.
6. In the event that the permit is denied, the parties will enter into such negotiations with the

permitting agencies as are appropriate to seek reconsideration and permission for the causeway removal project to proceed. In the event that despite the parties' best efforts, the causeway removal project is not permitted, Defendants will pay for 15 acres of additional wetland restoration to a party to be agreed upon, at the State of North Carolina's then-applicable non-marsh wetland restoration rate per acre. This payment will be made within 60 days of permit denial.

7. Should Defendants propose to develop the upland property adjoining the causeway owned by Mr. Yow and Mr. Miller, and identified by Onslow County Property Parcel Identification No. 750-1.3, Plaintiffs agree that Defendants are entitled to pursue lawful and reasonable residential development of the adjoining upland property. Plaintiffs will not object to the reasonable and lawful residential development of the adjoining upland property. However, Defendants will provide Plaintiffs with the opportunity to review all development plans prior to submission of such plans to state and federal permitting agencies, shall allow Plaintiffs to comment to Defendants on such plans, and shall allow Plaintiffs to comment to permitting agencies regarding such plans. Plaintiffs agree that they will not appeal any permits granted for such development. This provision applies only to Defendants and does not apply to proposals by any successor or assign of the Defendants to develop the property.